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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 416

In the Matter of:
JAMES G. NASH,
Petitioner,

vs.

MARGARET B. NASH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW.

The opinion of the District Court (Record p. 26) has not been reported. A copy is appended as Appendix I.

The opinion of the Court of Appeals (Record p. 32) has not been reported. A copy is appended as Appendix II.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 27, 1956 (Record p. 36). A copy is appended as Appendix III. A petition for rehearing was denied on August 7, 1956 (Record p. 58). A copy is appended as Appendix IV.

The jurisdiction of this Court is invoked under the provisions of Title 28, **United States Code Annotated**, § 1254 (1).

QUESTIONS PRESENTED.

The following questions are presented for review:

1. Whether the Petitioner is precluded from questioning the validity of a foreign personal judgment rendered against him for alimony, as having been rendered without that notice essential under the Due Process Clause of the Constitution, in the absence of a showing by him that he had an adequate defense on the merits.

2. Whether, where a Florida State Court acquired jurisdiction of the parties for the purpose of rendering a divorce decree providing for the payment of monthly alimony in the future, the Florida Court may, within the meaning of the Due Process Clause of the Federal Constitution, enter a personal judgment against the non-resident petitioner residing in Alabama, for subsequently accruing alimony payments upon the mere casual or extra-official notice to

the Petitioner in Alabama of a Petition to Show Cause and Order to Show Cause filed in and entered by the Florida Court, without compliance with the Florida Statutes providing for substituted service of process by publication in suits or proceedings wherein personal service of process or notice is not required.

3. Whether a foreign judgment and decree in a divorce action, awarding Respondent certain sums payable monthly in the future as alimony, such payments being conditioned by the decree to be payable "during her natural life or until her remarriage" fails to give the Respondent a vested right in future accruing alimony installments, and constitutes such a conditional judgment as not to be entitled to full faith and credit when sued upon in a Federal Court.

4. Whether a foreign judgment for alimony payable in the future, conditioned as set out in Question No. 3 above, gives the Respondent a vested interest in future accruing alimony installments and requires the Federal Court to give such judgment full faith and credit when sued upon there, where the rendering Court has the right, under State Law, to modify such judgment retrospectively because of the remarriage of the Respondent.

5. Whether Summary Judgment may properly be rendered for the Respondent in the Federal District Court in Alabama in an action founded upon a foreign Florida judgment rendered against Petitioner while a resident of Alabama, where the validity of such judgment was questioned by the Petitioner, and where a copy of the judgment made the basis of the Motion for Summary Judgment failed to contain any evidence of service of process or notice upon the Petitioner, or to show the manner in which the Petitioner was cited to appear and afforded an opportunity to be heard.

6. Whether Judicial Proceedings of a State are entitled to full faith and credit, under the provisions of Title 28, **United States Code Annotated**, § 1738, when sued upon in the Federal District Court, where the same are attested merely by a Deputy Clerk, and merely as being "A true copy of the originals," and where the certificate of the Judge makes no reference to the attestation of the Deputy Clerk.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The Constitutional Provisions involved are the Due Process Law Clause of the Fourteenth and Fifth Amendments to the United States Constitution; Statutes involved are Title 28, United States Code Annotated, § 1738, and Chapter 48, of Volume 2, of **Florida Statutes Annotated**; and the Rule involved is Rule 30 of the Court of Appeals for the Fifth Circuit, dated September 1, 1951. The pertinent provisions of these are set out as Appendix V.

STATEMENT OF THE CASE.

The Complaint.

On October 25, 1955, the Respondent, a resident of the State of Florida, filed her complaint (Record p. 1) against the Petitioner, a resident of the State of Alabama, in the District Court of the United States for the Northern District of Alabama, Southern Division, containing two counts. In Count One, the Respondent sought to recover from the Petitioner a certain sum of money pursuant to two judgments which were alleged to have been rendered in favor of the Respondent and against the Petitioner on May 31, 1955 and on October 25, 1955, respectively. These judgments were alleged to have been entered by a Florida Court for arrearages in alimony payments, payable under

a decree of divorce previously entered by the Florida Court on May 25, 1954.

The original divorce decree required the Petitioner to pay to the Respondent a certain sum of money per month "during her natural life or until her remarriage" and was entered pursuant to a property settlement agreement between the parties.

Count Two of the complaint claimed a like sum of money as representing arrearages for alimony payments due and payable under the provisions of the original decree of divorce.

The Answer.

The petitioner answered (Record p. 7) admitting the entry of the original decree of divorce and his failure to pay the monthly payments referred to in the complaint, but denied the allegations of the complaint with respect to the entry of personal judgments against him for the subsequently accruing installments, and asserted that the subsequent judgments, if any, were rendered without either personal or substituted service of notice to the Petitioner, at the time a resident of the State of Alabama, as required under the local practice and laws of the State of Florida, and by the Due Process of Law provisions of the Federal Constitution.

With respect to Count Two of the complaint, which was based upon the nonpayment of alimony installments payable under the original divorce decree, the Petitioner's answer asserted that such decree did not constitute such a final and ~~unconstitutional~~ judgment as to be entitled to full faith and credit in the District Court. This, for the reasons that (1) there was written on the face of the decree a condition that such alimony installments were payable only during the Respondent's lifetime or until her

remarriage; (2) that such alimony installments, even when accrued, are subject to modification retrospectively by the Florida Court upon the remarriage of the Respondent; and (3) that such a divorce decree, so conditioned, does not give to the Respondent a vested right in future accruing installments.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Thereafter, the Respondent filed her motion for a summary judgment (Record p. 14). In support of this motion, the Respondent filed the following:

Exhibit A.

Exhibit "A" (Record p. 16) purports to be the order of the Florida Court in which judgment was entered against the petitioner for the non-payment of certain alimony installments payable under the original divorce decree. The judgment recites that a Petition for a Rule to Show Cause and Order to Show Cause were previously filed in and entered by the Court and that an Alabama attorney for the Respondent allegedly served a true copy of such Petition and Order upon the Petitioner at his place of business in Alabama by delivering to the Petitioner personally an alleged true copy of such Petition and Order. Neither the Petition to Show Cause nor the Order to Show Cause, nor the evidence as to the alleged service thereof on the Petitioner is set out in the judgment made the basis of Exhibit "A."

The attestation of this judgment appears under the signature of a Deputy Clerk as follows:

> "A true copy of the original this the ... day of June 7, 1955, 19....
>
> W. A. Wynne, Clerk Circuit Court, Sarasota County, Florida by Betty K. Steere, Deputy Clerk."

The certificate of the Judge of the Court recites, among others, that "W. A. Wynne, whose name is subscribed to the foregoing certificate, was at the time of the signing and sealing of the same, Clerk of the Circuit Court of Sarasota County, Florida" and makes no reference to the attestation of Betty K. Steere, as Deputy Clerk.

Exhibit B.

Exhibit "B" (Record p. 19) purports to be a copy of the second judgment of the Florida Court rendered against the Petitioner for the non-payment of other alimony installments payable under the original divorce decree. The notice recited there to have been given the Petitioner of the proceedings leading to this judgment was the delivery by Respondent's Alabama counsel of an alleged copy of the Petition for a Rule to Show Cause and Order to Show Cause upon an alleged employee of the Petitioner at the Petitioner's place of business in Alabama, with instructions that the same be given to the Petitioner, and the mailing by the Clerk of an alleged true copy of the Petition and Order to the Petitioner, addressed at his place of business and residence in Alabama. Here too, neither the Petition to Show Cause nor the Order thereon nor the evidence as to the alleged service thereof is set out in the judgment made the basis of Exhibit "B." The attestation and certification of this document, except as to the name of the Deputy Clerk, are made in the same manner as above set out with respect to the document made the basis of Exhibit "A", supra.

Exhibit C.

This Exhibit (Record p. 24) constituted the Affidavit of the Respondent to the effect that she was plaintiff in the suit and resided in the State of Florida; that a decree of divorce was granted by the Florida Court on May 25, 1954, providing for monthly alimony payments, and that

there was due and owing her a certain sum for such alimony payments, and that she was living and had not remarried.

THE DECISION OF THE DISTRICT COURT.

Based upon these three Exhibits and the pleadings, the District Court granted the Respondent's motion for summary judgment.

THE DECISION OF THE COURT OF APPEALS.

Petitioner appealed to the Court of Appeals for the Fifth Circuit. The appeal was based on the principal contention that the Florida Subsequent Judgments were entered without due process and that these as well as the Original Divorce Decree, insofar as the enforcement of payment of alimony under the latter decree is concerned, were not entitled to full faith and credit in the District Court. The Court of Appeals, relying 'primarily' on the view that the Petitioner's failure to deny his obligation to pay alimony and his failure to present any excuse for his continuing default in respect thereto presented no issue of fact or of law, summarily brushed aside the Petitioner's objections on constitutional grounds, and affirmed the judgment of the District Court with damages, under Rule 30 of the Appellate Court.

Petition for rehearing was denied.

BASIS OF FEDERAL JURISDICTION.

Federal jurisdiction in the Court of first instance is based upon diversity of citizenship and amount.

ARGUMENT.

1.

The Right to Due Process of Law Does Not Depend Upon Whether An Individual Has a Defense Upon the Merits.

The Circuit Court of Appeals has decided the question of Due Process in a way in conflict with applicable decisions of this Court. In affirming the judgment of the District Court, the Circuit Court of Appeals says:

> "Pointing out that the record is wholly devoid of any claim by the defendant that he had or has any defense to the obligation contractually assumed by him in a property settlement with his wife, to which was added the sanction of a judicial decree, and that enforcement of this has been delayed by a supersedeas, Appellee insists that the appeal was sued out merely for delay, and that the judgment should be affirmed with damages under Rule 30. We agree. The judgment is accordingly affirmed with damages."

This Court in the case of **Henry L. Coe v. Armour Fertilizer Works**, 237 U. S. 413, 35 S. Ct. 625, 69 L. Ed. 1027 said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same results because he had no adequate defense upon the merits."

In **Milliken v. Meyer**, 85 L. Ed. 278, 61 S. Ct. 339, this Court held that the full faith and credit clause of the Constitution "precludes any inquiry into the merits of the cause of action . . ."

Yet the Court of Appeals denied Petitioner the constitutional right to question the validity of the Florida Judgments for want of due process on the ground that Petitioner failed to assert a defense to the merits, which defense, if made, the District Court would have been precluded from considering.

Accordingly, the decision of the Court of Appeals clashes with the decisions of this Court upon both the full faith and credit as well as the due process clauses of the Constitution.

A.

The Opinion of the Court of Appeals Is in Conflict With the Decision of Another Court of Appeals on the Same Subject.

The Circuit Court of Appeals for the District of Columbia Circuit in the case of **W. J. R., the Good Will Station, v. Federal Communications Commission,** 174 F. (2d) 226, reversed by this Court on other grounds, 69 S. Ct. 1097, 337 U. S. 265, 93 L. Ed. 1353, held that:

> "Denial of a procedural right guaranteed by the Constitution—in this instance deniel of a hearing guaranteed by the due process clause—is never 'harmless error.' "

The Court of Appeals in the cause now sought to be reviewed not only summarily brushed aside and refused to consider the petitioner's rights guaranteed under the due process clause of the Constitution, but in fact penalized the Petitioner under Rule 30 of the Court for asserting them. In this respect, the Court of Appeals, to quote from Rule 19 of this Honorable Court, "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

2.

The Florida Judgments, and the Judgment of the District Court Based Thereon, Are Void as Having Been Rendered Without Due Process of Law.

In the case of **Griffin v. Griffin**, involving a judgment for alimony, 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635, this Court held that:

> "It is plain in any case that a judgment in personam directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the State's power over him, without some form of notice by personal or substituted service."

And there must be strict compliance with statutory provisions for substituted service. In **Galpin v. Page**, 21 L. Ed. 959, 18 Wall. 350-375, this Court said:

> "When, therefore, by legislation of a State, constructive service of process by publication is substituted in place of personal citation, and the Court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the Courts of every State in the Union."

This rule was recently affirmed by the Supreme Court of Florida in the case of **Napoleon B. Broward Drainage Dist. et al. v. Certain Homes Upon Which Taxes Are Due**, 33 So. (2d) 716.

The forms of notice to Petitioner resorted to in this cause are contrary to the statutory scheme which the State of Florida has provided for such occasions, as set out in Chapter 48 of Volume 2, Florida Statutes Annotated. As

such, they are mere improvisations and are without warrant of law. Even actual knowledge of the attempted service does not render the same effectual, if, in fact, the process was not served in accordance with the requirements of the statute (42 **Am. Jur.**, p. 55; **Henry L. Coe v. Armour Fertilizer Works**, supra). This Court has admonished long ago in the **Henry L. Coe** case, supra, that:

> "Nor can extra official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law as the Constitution requires."

There is no conflict here with the case of **Milliken v. Meyer**, supra. There this Court upheld extra-territorial service of process upon a **resident** of the State, **pursuant to a clear and specific scheme provided by the State for such service.** Here the petitioner is a non-resident and the very scheme of service of process provided by the State for his benefit was ignored.

Accordingly, since the Florida Judgments in question were rendered without due process the judgment of the District Court based thereon is also contrary to due process, within the principle announced by this Court in **Griffin v. Griffin**, supra.

3.

No Action May Be Maintained in the District Court on the Original Decree of Divorce for the Non-Payment of Alimony Installments, for the Reason That Such Decree of Divorce Is on Its Face Conditional.

The Supreme Court of Alabama has clearly and definitely settled this identical question in the following cases:

McAllister v. McAllister, 214 Ala. 345, 107 So. 843;
New York Life Ins. Co. v. Stokes, 247 Ala. 639, 25 So. (2d) 783;
Ives v. Ives, 247 Ala. 689, 26 So. (2d) 92.

In **McAllister v. McAllister**, supra, the Court had before it a Louisiana decree, providing for the payment of alimony "as long as said alimony is necessary, or until the plaintiff . . . should contract another marriage." The Court declined to enforce payment of accrued alimony installments, saying:

> " . . . There was written upon the face of the order itself, except as to the first installment, a clear restriction upon defendant's duty to pay in such sense as to deny the plaintiff any vested right in future accruing installments, and reserving to the rendering Court exclusively, the right and the power to ascertain the existence vel non of the contingency upon which they were to be paid."

There is no conflict here with the case of Sistare v. Sistare, 30 Sup. Ct. 682, 218 U. S. 1, 54 L. Ed. 905. The Supreme Court of Alabama recognizes and follows the principles laid down by this Court in that case.

It did so in the case of **Green v. Green**, 239 Ala. 407, 195 So. 549. But the **Green** and the **Sistare** cases provided for alimony payments payable without condition or contingency. The distinction between the **Sistare** case and the present case is the same as that found by the Alabama Court to exist between the **Ives** case, supra, and the **Green**, case, supra.

The Alabama Court in the **Ives** case in referring to the Green case states such distinction succinctly as follows:

> "**But that decree fixed a definite sum to be paid without condition or without contingency.** Such amounts become, after they are due and unpaid, absolutely fixed with all the properties of a personal judgment and cannot be modified or annulled and are not dependent upon any unascertained state of facts."

A.

This Question of Federal Law Has Not Been Settled.

Most divorce decrees contain conditions similar to those here, and a large number of such decrees are rendered by Courts of states of which the husband is a non-resident. The Federal question involved with respect to the enforcement of the alimony provisions of such foreign decrees by the Courts in other states is of extreme importance. To our knowledge, this Court has not decided this question, and we respectfully submit that the writ prayed for is due to be granted in order that this important question may be settled by this Court.

4.

Original Divorce Decree Is Subject to Modification by Florida Court Retrospectively as to Alimony Installments Accruing Subsequent to Remarriage by Respondent.

The Florida Supreme Court has held that Florida Courts have the power to modify a divorce decree as to alimony payments which have accrued and are unpaid at the time the petition for modification is filed because of the remarriage of the erstwhile wife of the petitioner. In **Friedman v. Schneider**, 52 So. (2d) 420, the Florida Court held that accrued installments after remarriage and before a petition for modification was filed were not due to be paid. Accordingly, in the face of the specific conditions in the decree sued upon and the right of the Florida Court to modify the same retrospectively on account of such conditions, the Respondent can acquire no vested right in any installment of alimony, whether past due or not, under the principles laid down by this Court in the **Sistare** case, and the decree, as to enforcement of alimony, is not entitled to full faith and credit in the District Court.

5.

Florida Judgments on Their Face Fail to Show That the Court Acquired Jurisdiction Over the Petitioner.

Copies of the judgments made the basis of the motion for summary judgment failed to show either a copy of the Petition for an Order to Show Cause or the Order issued thereon, or the evidence of service of process upon the Petitioner. In the absence of these, it cannot be determined from the face of the judgments whether the Petitioner was duly cited to appear or whether he was afforded an opportunity to be heard. Since, according to **Galpin v. Page,** supra, there is here no presumption of jurisdiction over the person of the Petitioner by the Florida Court, and since Petitioner's answer questioned such jurisdiction, it was improper for the District Court to enter a summary judgment against Petitioner, in the absence of any record before it showing the essential jurisdictional proceedings.

6.

Subsequent Florida Judgments Are Not Entitled to Full Faith and Credit Under Title 28, United States Code Annotated, Section 1738.

These judgments were authenticated by a Deputy Clerk. Title 28, Section 1738, requires such attestation "of the Clerk." We find no decision on this question by this Court. State Courts have held that an attestation by a Deputy Clerk is ineffective.

Mairitz v. Schwind, 101 S. W. 21;
Willock v. Wilson, 59 N. E. 757, 178 Mass. 68.

CONCLUSION.

The decision of the Court below violates the due process and the full faith and credit provisions of the Constitution, and is at variance with the decisions of this Court, as well as with a decision of another Court of Appeals. It also presents, in the words of Rule 19 of this Court, several important Federal questions which have not been, but should be, settled by this Court. A review of this case on the merits will bring tranquility and certainty on a subject of great public interest, affecting many litigants in litigation, occurring frequently, throughout the entire nation. Accordingly, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel.

Proof of Service of Petition.

I, Morris K. Sirote, an attorney in the office of Messrs. Sirote, Permutt, Friend and Friedman, Attorneys of Record for James G. Nash, Petitioner herein, depose and say that on the.....day of September, 1956, I served a copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Margaret

B. Nash, the Respondent herein, by delivering the same to William A. Pritchard, Jr., in the offices of Messrs. Pritchard, McCall, and Jones, Counsel of Record for said Margaret B. Nash, located at 831 Frank Nelson Building, Birmingham 3, Alabama.

.....

Morris K. Sirote.

Subscribed and sworn to before me, at Birmingham, Alabama, this the 13th day of September, 1956.

.....

Notary Public, Jefferson
County, Alabama.

My Comm. expires: .....

APPENDIX.

APPENDIX I.

Opinion of the District Court.

"This cause coming to be heard on a regular pre-trial hearing and the parties being represented by their respective counsel, counsel for the plaintiff called to the Court's attention the plaintiff's motion for summary judgment heretofore filed in this cause pursuant to Rule 56, Federal Rules of Civil Procedure. It appearing to the Court from the affidavit of the plaintiff, exhibits to plaintiff's motion for summary judgment, and from the pleadings on file in this cause, that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law. After due consideration of said motion and the extended argument of counsel, the Court is of the opinion that plaintiff's motion for summary judgment should be granted.

It is, therefore, Ordered, Adjudged, and Decreed by the Court that summary judgment be and the same is hereby entered in favor of the plaintiff, Margaret B. Nash, and against the defendant, James G. Nash, in the amount of $3,201.19, and the costs accrued herein be and the same are hereby taxed against the defendant, for the collection of which judgment and costs execution may issue.

Done, this 7th day of February, 1956."

APPENDIX II.

Opinion of the Court of Appeals.

"Hutcheson, Chief Judge: This appeal is from a summary judgment entered in favor of appellee for past due alimony in the amount of $3,201.19, and costs, on a complaint in two counts. Count One was based on two supplementary judgments of the Florida Court, directing payment of past due installments. Count Two was a common count for money owing under the original decree of divorce and for alimony of the Florida Court.

The Judgment was entered after a hearing and upon the finding, 'that there is no genuine issue as to any material fact, and that the plaintiff is entitled to a judgment as matter of law.' [1]

---

[1] The trial court had before it as the basis for the judgment the following admissions in defendant's answer:

> Defendant is a citizen and resident of Jefferson County, Alabama, and conducts a loan business in Birmingham, Ala.
>
> On May 24, 1954, a final decree was entered in the Circuit Court of the Twelfth Judicial Circuit of Florida in and for Sarasota County, Florida, in Chancery, case No. 9750, which decree ordered, among other things, that the defendant pay unto plaintiff the sum of $350.00 per month as permanent alimony to be paid to her by said defendant on the 25th day of June, 1954, and each and every month thereafter during her natural life or until her remarriage. This was in accordance with a property settlement agreement entered into between the parties signed by appellant, and made part of said final decree.
>
> Defendant failed to make the monthly payments of $350.00 to the plaintiff for the nine months beginning January, 1955, and ending September, 1955, totalling $3,150.00.

In addition, the court had before it the following affidavits and exhibits:

> The affidavit of plaintiff dated Jan. 27, 1956, that she is in natural life and for more than one year past was a resident of Sarasota County, Florida, and had not remarried since the divorce from defendant on May 25, 1954. That she has received no payment under said divorce decree since August 25, 1954, and that the total amount due and owing her under said decree

At the hearing on plaintiff's motion for summary judgment below, the defendant offered no counter affidavits, and no evidence of any nature in attack upon, opposition to, or denial of, the Florida judgments or the recitals therein contained, or the facts stated in plaintiff's affidavits and exhibits; nor did he make any proffer showing or tending to show that there was a genuine issue of fact to be tried.

Here, as was the case below, defendant neither denies the material facts on which the judgment appealed from was based, nor presents any excuse for his continuing default. Indeed, he admits the existence of his obligation to pay the plaintiff alimony, his continuing default in respect thereto, and his wilful persistence therein.

Relying entirely on hypertechnical objections, going not to the substance of his obligation to pay alimony, but to the form and manner of notice to him of the supplementary proceedings for judgment, and to the certification of the Florida judgments, and objection not made below, he urges upon us that the judgment was improperly entered and should be reversed.

Pointing out that the record is wholly devoid of any claim by the defendant that he had or has any defense to

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for the months of January through Sept., 1955, inclusive, was $3,150.00, plus interest.

Duly certified copies of two supplementary judgments of the Circuit Court of the Twelfth Judicial Circuit of Florida in and for Sarasota County in chancery, one for $1400.00 for arrears of the payments ordered by the court to be paid to the plaintiff for payments accruing under the original judgment on Jan. 25, Feb. 25, March 25, and April 25, 1955—aggregating $1400.00; the other for $1750.00 for similar arrears in alimony payments for May through Sept., 1955. Each of these judgments was entered upon a hearing after a rule to show cause had been issued requiring 'the defendant, James G. Nash, to show cause, if any he has, why the permanent alimony alleged to be in arrears under the Final Decree of Divorce entered in this cause should not be adjudicated'; and upon evidence and findings that he had received notice of the hearing.

the obligation contractually assumed by him in a property settlement with his wife, to which was added the sanction of a judicial decree, and that enforcement of this has been delayed by a supersedeas, appellee insists that the appeal was sued out merely for delay, and that the judgment should be affirmed with damages under Rule 30.

We agree. The judgment is accordingly Affirmed with damages."

APPENDIX III.

Judgment Below.

"This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed with damages;

It is further ordered and adjudged that the appellant, James G. Nash, and the surety on the supersedeas bond herein, Gulf American Fire & Casualty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court."

APPENDIX IV.

Order Denying Rehearing.

"It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied."

APPENDIX V.

Constitutional Provisions, Statutes, and Regulations Involved.

Constitutional Provisions:

Amendment XIV. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment V. "No person shall be— . . . deprived of life, liberty, or property, without due process of law; . . ."

Statutes Involved:

Title 28, U. S. Code Annotated, § 1738.

". . . The records and judicial proceedings of any Court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Volume 2, Chapter 48, Florida Statutes Annotated.

"Chapter 48, Constructive Service of Process:"

"48.01 **Service of process by publication, in what cases"**

"Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in § 48.02 in any suit or proceeding:

". . . (10) In any other suit or proceeding, not hereinabove expressly mentioned, wherein personal service of process or notice is not required by the statutes or constitution of this State or by the constitution of the United States."

"48.02 **Service of process by publication, upon whom"**

"Where personal service or process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including: . . ."

"48.03 **Sworn statement as condition precedent"**

"(1) As a condition precedent to service by publication, there shall be filed in the cause a statement executed by the plaintiff, his agent or attorney, setting forth substantially the matters hereafter required, which statement may be contained in the initial or other pleading, if sworn to, or in any affidavit or other sworn statement."

"(2) The word 'plaintiff' as used in this chapter shall extend to any party in the cause who may be entitled to service of original process upon any party to the cause or any person who may be brought in or allowed to come in as a party by any lawful means. The word 'defendant' as used in this chapter shall extend to any party on whom service by publication is authorized by this chapter, without regard to his designation in the pleadings or position in the cause."

"(3) After the entry of a final judgment or decree in any cause no sworn statement shall ever be held defective for failure to state a required fact if the said fact otherwise appears from the record of the cause."

"48.04 **Sworn statement, natural person as defendant"**

"The sworn statement of the plaintiff, his agent or attorney, for service of process by publication against a natural person, shall show:

"(1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and,

(2) Whether such person is over or under the age of twenty-one years, if his age is known, or that his age is unknown; and,

(3) In addition to the above, that the residence of such person is, either:

(a) Unknown to the affiant; or,

(b) In some state or country other than the State of Florida, stating said residence if known; or,

(c) In the State of Florida, but that he, (i) has been absent from the state for more than sixty days next preceding the making of the sworn statement, or (ii) conceals himself so that process cannot be personally served upon him, and that affiant believes that there is no person in the State of Florida upon whom service of process would bind said absent or concealed defendant."

"48.08 **Notice of suit, form"**

"Upon filing the sworn statement, and otherwise complying with the foregoing requirements, the plaintiff shall

be entitled to have issued by the clerk or judge, not later than sixty days after the filing of the sworn statement, a notice of suit which notice shall set forth:

"(1) The names of the known natural defendants; the names, status and description of the corporate defendants; a description of the unknown defendants who claim by, through, under or against a known party which may be described as 'all parties claiming interests by, through, under or against (name of known party),' and a description of all other unknown defendants which may be described as 'all parties having or claiming to have any right, title or interest in the property herein described';

(2) The nature of the suit or proceeding in short and simple terms (but neglect to do so shall not be construed as jurisdictional);

(3) The name of the Court in which the suit or proceedings were instituted and an abbreviated title of the case;

(4) The description of real property, if any, proceeded against."

"48.09 **Notice to appear, return day"**

"The notice of suit shall require the defendant to file his answer with the clerk of the court and to serve a copy thereof upon the plaintiff or plaintiff's attorney, whose name and address shall appear in, or be annexed to, said notice not later than the date fixed in said notice, which date shall be not less than twenty-eight nor more than sixty days after the first publication of the notice."

"48.10 **Notice of suit, publication, proof and recording thereof"**

"(1) All such notices of suit shall be published once during each week for four consecutive weeks (four publications being sufficient) in some newspaper published in

the county where the court is located, said newspaper to meet such requirements as may be prescribed by law for such purpose.

(2) Proof of such publication shall be made by affidavit of either the owner, publisher, proprietor, editor, business manager, foreman or other officer or employee of such newspaper having knowledge of such publication, which affidavit shall set forth or have attached a copy of said notice, shall set forth the dates of each publication and otherwise comply with the requirements of law, and shall be recorded in the chancery order book or minute book of the Court wherein the suit or proceeding is pending, unless a certificate thereof be made as provided in § 48.12."

"48.12 **Notice of suit, certificate of publication or posting in lieu of recording"**

"In lieu of the recording of the proof of publication or posting as provided in §§ 48.10 and 48.11, there may be filed in such proceeding a certificate executed by the clerk or judge stating that such proof of publication was filed, the name of the newspaper in which such notice of suit was published, that such newspaper is qualified under the law as one in which to publish legal notices and the dates upon which the proof of publication states that the notice was published; or if such notice of suit was posted, then such certificate shall state that such notice was posted at the front door of the courthouse in such county and in two other conspicuous places in the county for at least twenty-eight days prior to the return day thereof."

"48.13 **Notice to defend, mailing of"**

"If the residence of any defendant or other party to be served by publication shall be stated in the sworn statement with more particularity than the name of the state or country in which the defendant resides, the clerk, or the

judge if there be no clerk of such court, shall mail a copy of such notice by United States mail, with postage prepaid, to each such defendant within ten days after the making of the notice, the date of mailing to be noted on the docket. A copy of the complaint shall be mailed to non-resident defendants."

Rule Involved:

Rule 30, of the Circuit Court of Appeals for the Fifth Circuit.

". . . 2. In all cases where an appeal shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, shall be awarded upon the amount of the judgment. . . ."

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 416

JAMES G. NASH,
Petitioner

vs.

MARGARET B. NASH,
Respondent

ON PETITION FOR WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Of Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 416

IN THE MATTER OF:

James G. Nash,
Petitioner,

vs.

Margaret B. Nash,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT

It is respectfully submitted that the Petition for a Writ of Certiorari filed in this case was filed only for the purpose of delay and that said Petition fails to show any grounds for granting such a Writ, and that this is an appropriate case in which this Honorable Court should adjudge to the Respondent reasonable damages for delay as provided

in Rule 56 of this Honorable Court.

QUESTION PRESENTED

Will this Honorable Court review a decree of the Circuit Court, awarding Plaintiff, Respondent here, on a common count $3,201.19, judgment against Defendant, Petitioner here, where the District Court found as a fact that the money was due and owing on the day the complaint was filed, and this fact was concurred in by the Court of Appeals?

BRIEF AND ARGUMENT

Count Two of Plaintiff's Complaint filed in the District Court is a common Count in which Plaintiff demands judgment against the Defendant for $3,150.00, together with interest and costs. R. 3.

The District Court, Grooms, Judge, found:

> "It appearing to the Court from the Affidavit of the Plaintiff, Exhibits to Plaintiff's Motion for Summary Judgment, and from the pleadings on file in this cause, that there is no genuine issue as to any material fact and that the Plaintiff is entitled to a judgment as a matter of law." R. 26.

The Court accordingly entered judgment in favor of the Plaintiff, Margaret B. Nash, and against the Defendant, James C. Nash, in the amount of $3,201.19. R. 26.

The Defendant, Petitioner here, appealed from said decree to the United States Court of Appeals for the Fifth Circuit and superseded the judgment entered against him. R. 27.

The Court of Appeals, Hutchinson, Chief Judge, in the opinion here sought to be reviewed specifically found:

> "Here, as was the case below, defendant neither denies the material facts on which the judgment appealed from was based, nor presents any excuse for his continuing default. Indeed, he admits the existence of his obligation to pay the plaintiff alimony, his continuing default in respect thereto, and his wilful persistence therein."

Nash v. Nash, 5 Cir., 234 F2d 821, 822

Judge Hutchinson, it will be noted in the foot note to the opinion of the Court of Appeals here sought to be reviewed, analyzed and set forth the facts the basis for the judgment. No one reading the opinion of Judge Hutchinson, even without reading the analysis of the facts here referred to, could in our humble opinion fail to concur in the correctness of the conclusion stated in our preliminary statement incorporated in this Brief.

The foregoing facts being true, there is no basis for entering into any extended discussion concerning the manner and form in which the judgment admittedly entered in favor of Plaintiff and against Defendant in the Circuit Court of Sarasota County, Florida was certified. We submit as a

matter of fact that the judgment was properly certified as required by the Acts of Congress. However, this question in our humble opinion is moot in view of the facts found by the the District Court, concurred in by the Court of Appeals, relating to Count Two of the Complaint. Judge Hutchinson put the contentions made by Plaintiff in the brief file in this Court in proper perspective when he stated:

> "Pointing out that the record is wholly devoid of any claim by the Defendant that he had or has any defense to the obligation contractually assumed by him in a property settlement with his wife, to which was added the sanction of a judicial decree, and that enforcement of this has been delayed by a supersedeas, appellee insists that the appeal was sued out merely for delay, and that the judgment should be affirmed with damages under Rule 30."
>
> "We agree."
>
> *Nash v. Nash,* Supra

We cannot help but assume that Petitioner and his Counsel knew when the Petition for Certiorari was filed in this cause, that where, as here, the findings of fact made by the District Court, that the money in question was due, is concurred in by the Court of Appeals, in a simple assumpsit action, that this Court will not review such a judgment on a Writ of Certiorari.

It is clear that the sole purpose of filing the Petition in this case was to attempt by delaying payment to

the Respondent of amounts justly due and owing to her, to enable the Petitioner here by the application of economic pressure to force some type of alimony settlement with the Respondent, and thus to defeat his solemn agreement to pay, and the terms of the decree of the Circuit Court of Sarasota County, Florida.

CONCLUSION

Wherefore, it is respectfully submitted that under the Rules of this Honorable Court, the Petition for Certiorari should be dismissed forthwith, and that this Honorable Court should as by Rule 56 provided, adjudge to the Respondent reasonable damages for the delay occasioned by the filing of this Petition for Certiorari, and appropriate damages for the added costs incurred in this Court.

Respectfully submitted,

William S. Pritchard

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PROOF OF SERVICE

I, William S. Pritchard, Jr., an Attorney in the office of Pritchard, McCall & Jones, Attorneys of Record for Margaret B. Nash, Respondent herein, deposes and says that on the 27 day of September, 1956 I served a copy of the foregoing Brief of Respondent on the Petitioner, James G. Nash, by delivering a copy of the same to Morris K. Sirote, a member of the Firm of Sirote, Permutt, Friend & Friedman, at their offices located in the Brown-Marx Building, Birmingham, Alabama.

William S. Pritchard, Jr.

Subscribed and sworn to before
me, at Birmingham, Alabama,
this the 27 day of September,
1956.

Maude E. Quarles
Notary Public.

My Commission Expires: Oct. 14, 1956